Filed 7/30/19 Rossi v. A. Rossi, Inc. CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

JOHN ROSSI, Plaintiff and Appellant, v. A. ROSSI, INC. et al., Defendants and Respondents.	C083138 (Super. Ct. No. STKCVUBT20112785) ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

Appellant filed a petition for rehearing with this court. It is ordered that the nonpublished opinion filed herein on July 1, 2019, be modified as follows:

1. At page 4 of the slip opinion, in the last full paragraph, delete the last quoted sentence so that the paragraph reads:

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) Additionally, " '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' " (*Ibid*.)

2. At page 8 of the slip opinion, in the first partial paragraph, edit the sentence "The evidence also established that John was told millions of dollars were missing from the company as early as 1996" to read:

The evidence also established that John was told a million dollars was missing from the company as early as 1996.

3. At page 8 of the slip opinion, at the end of the first partial paragraph, following the sentence "Accordingly, even with the existence of a fiduciary duty, substantial evidence supports the conclusion John had a duty to examine the documents that were available to him" add the following sentences:

In its statement of decision, the trial court rejected John's argument that the statute of limitations did not run because he did not discover some of the transactions until 2014 on the basis that he "had access to the corporate financial information and tax returns at all times and he did not previously ask for this information." John has not demonstrated that this conclusion was reversible error.

4. At page 8 of the slip opinion, delete the entire paragraph beginning with "Further, John cannot use the trial court's failure to express this conclusion . . . ."

There is no change in the judgment. Appellant's petition for rehearing is denied.

BY THE COURT:

/S/

HULL, Acting P. J.

/S/

HOCH, J.

/S/

RENNER, J.

Filed 7/1/19 Rossi v. A. Rossi, Inc. CA3 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

JOHN ROSSI, Plaintiff and Appellant, v. A. ROSSI, INC. et al., Defendants and Respondents.	C083138 (Super. Ct. No. STKCVUBT20112785)

Plaintiff John Rossi appeals from a judgment after a bench trial on his shareholder's action against three current and former officers, directors, and shareholders of a family-owned, closely-held corporation. John contends the trial court erred in entering judgment in favor of the defendants based on the statute of limitations and laches. John has failed to demonstrate any reversible error with respect to the trial court's rulings on his causes of action for breach of fiduciary duty. However, we agree the trial court failed to make the necessary findings to support its conclusion that John's other

claims were barred by laches. We will reverse and remand for further proceedings in light of these conclusions.

I. BACKGROUND

John filed this action on February 23, 2011. The operative complaint alleges, on behalf of himself and derivatively on behalf of nominal defendant A. Rossi, Inc. (ARI), three causes of action for breach of fiduciary duty, and equitable causes of action for unjust enrichment, removal of corporate directors, and accounting against Toinette Rossi, Valerie Rossi, and Patricia Tunison.[1]

Toinette, Valerie, and John are shareholders of ARI. Their father, Andrew, passed away in 2004. Andrew had been the president of ARI. Their cousin, Patricia, was also a shareholder and was ARI's president and sat on the board of directors after Andrew passed away.

Valerie also joined the board of directors after Andrew passed away and became president of ARI after Patricia passed away.

Toinette has been the secretary/treasurer and a director of ARI since 1976. At that time, ARI was in the business of buying and selling hay and cattle. John bought and sold hay, and also sold cattle for ARI. When ARI left the hay business in 1987, John formed John Rossi Hay Company. The business is operated on property owned by ARI, and John has not paid ARI any rent since 1993. John has never been an officer or director for ARI.

John's complaint challenges various actions taken by Andrew, Toinette, Valerie, and Patricia. At trial, evidence was introduced regarding the following:

1. A 1980 check for $200,000 to Toinette from ARI.

2. Lost profits regarding ARI's development of lots in the early 2000s.

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[1] Because most of the parties have the same last name, we will hereafter refer to them by their first names.

3. Payments made by ARI in 2002 and 2003 after the Office of the Comptroller of the Currency began investigating actions taken by Andrew and Toinette in their employment at Delta National Bank.

4. Loans and compensation for Toinette, Valerie, and Patricia that they approved as the board of directors in 2006 and 2007 to equalize a loan John had received and his lack of rent payments.

After trial, the court issued a tentative decision that provided it would become the statement of decision and judgment unless a party submitted proposals not included therein. (Cal. Rules of Court, rule 3.1590(c)(4).) John filed a request for a statement of decision listing 25 principal controverted issues he wanted the court to address. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).) The trial court thereafter issued a final statement of decision and judgment that was substantially the same as its earlier tentative decision.

The court held that the longest statute of limitations for any of John's legal claims was four years, and it barred any remedy for most of the transactions he complained of because they occurred before 2007: "[John] asserts that he did not discover some of the transactions until 2014, and that Toinette Rossi was in a fiduciary capacity as a director of the corporation. But [John] had access to the corporate financial information and tax returns at all times and he did not previously ask for this information. Further, Toinette was a director in title only until after 2004 when her father died. Until 2004 she acted as a secretary and did not participate in corporate decision making, only following her father's directions in paying bills, making deposits and bookkeeping. Toinette never received a director's fee until her father died. She was not in a fiduciary capacity as a director before 2004."

As to the equalizing loans and compensation for Toinette, Valerie, and Patricia, the trial court found that John "and his advisors were informed of the entire plan in meetings and discussions (where [John] said he did not intend to pay the corporation the

$400,000.00 promissory note he had borrowed in 2002). [John]'s attorney . . . and accountant . . . participated in the discussions. Had [John] not agreed to the 'equalization' plan, he probably would have been evicted from the corporate property that his family had occupied, rent free, for years. [John] signed Exhibit 319 . . . expressly agreeing to the 'equalization' plan which was set out in detail in that document."

As to John's equitable claims, the court concluded he was barred by the doctrine of laches from obtaining any equitable remedy because he neglected the rights asserted in his complaint.

John filed a timely appeal.

II. DISCUSSION

A. Standard of Review

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) Additionally, " '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' [Citation.] Specifically, '[u]nder the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision.' " (*Ibid*.)

B. Statute of Limitations

John contends the trial court erred in concluding his causes of action for breach of fiduciary duty were mostly barred by the applicable statute of limitations. "The Code of Civil Procedure does not specify a statute of limitations for breach of fiduciary duty. The cause of action is therefore governed by the residual four-year statute of limitations in

Code of Civil Procedure section 343 governing '[a]n action for relief not hereinbefore provided for' in the code." (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606.) John agrees this statute of limitations applies to his causes of action for breach of fiduciary duty. "As a general rule, statutes of limitations begin to run once every element of a cause of action has occurred." (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 683.) However, "[w]here a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity." (*Eisenbaum v. Western Energy Resources, Inc*. (1990) 218 Cal.App.3d 314, 324.) The court found that most of the transactions John complains about occurred more than four years before he filed his complaint. John concedes this is true as to all but his claims based on allegedly excessive compensation, but argues these claims are nonetheless not barred by the statute of limitations because Toinette owed him a fiduciary duty and he had no knowledge of the events prior to filing his lawsuit or duty to make any inquiry.

1. Fiduciary Duty

We first address John's assertion that the trial court incorrectly concluded Toinette had no fiduciary duty before 2004. Toinette testified that she has been an officer and a director for ARI since 1976. The trial court found that "Toinette was a director in title only until after 2004 when her father died. Until 2004 she acted as a secretary and did not participate in corporate decision making, only following her father's directions in paying bills, making deposits and bookkeeping. Toinette never received a director's fee until her father died."

With respect to officers, "something more than bare title . . . is required" to confer fiduciary status. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc*. (2000) 83 Cal.App.4th 409, 420, disapproved on another point in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154 ["a corporation cannot make a mail clerk its fiduciary by simply bestowing upon the clerk the title of officer"].) "[A]n officer who participates in

management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a 'nominal' officer with no management authority is not a fiduciary. Whether a particular officer participates in management is a question of fact." (*Id*. at pp. 420-421.) Toinette testified that she did not participate in decision-making while her father was alive. Thus, the trial court did not err in concluding she was not a fiduciary in her capacity as a corporate officer.

The trial court's conclusion that Toinette was not a fiduciary due to her role as a director, however, was error. A member of a corporation's board of directors has a fiduciary relationship to the corporation and its stockholders. (*Tenzer v. Superscope, Inc*. (1985) 39 Cal.3d 18, 31.) Toinette testified that she was a director at all relevant times and she also voted at annual meetings.[2] *Minton v. Cavaney* (1961) 56 Cal.2d 576, is instructive. An individual "held the post of secretary and treasurer and director in a temporary capacity and as an accommodation to his client." (*Id*. at p. 579.) Our Supreme Court held that "[i]t is immaterial whether or not he accepted the office of director as an 'accommodation' with the understanding that he would not exercise any of the duties of a director. A person may not in this manner divorce the responsibilities of a director from the statutory duties and powers of that office." (*Id*. at p. 580.) Likewise, though Toinette may have exercised her powers as a director minimally, the trial court's conclusion that she owed no fiduciary duty to John due to her position as director was erroneous.

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[2] The fact that Toinette did not receive a director's fee during this time does not negate her fiduciary duty. (*Lynch v. John M. Redfield Foundation* (1970) 9 Cal.App.3d 293, 301 ["By pointing out that they served without compensation, defendant directors imply that such fact might subject them to a lesser fiduciary obligation than a compensated trustee. No authority has been cited and we have found none. We see no basis for such conclusion"].)

2. Duty of Inquiry

In addition to concluding Toinette was not a fiduciary, the trial court also rejected John's argument for delayed accrual of the statute of limitations on the basis that he "had access to the corporate financial information and tax returns at all times and he did not previously ask for this information." John contends his access to this information was irrelevant. "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]." (*Hobbs v. Bateman Eichler, Hill Richards, Inc*. (1985) 164 Cal.App.3d 174, 201-202.) And, "[w]here the plaintiff is not under [a] duty to inquire, the limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Eisenbaum v. Western Energy Resources, Inc., supra,* 218 Cal.App.3d at p. 325, emphasis removed.) John's argument ignores the fact that even where a fiduciary duty exists, where the plaintiff "became aware of facts which would make a reasonably prudent person suspicious, she [or he] had a duty to investigate further, and she [or he] was charged with knowledge of matters which would have been revealed by such an investigation." (*Miller v. Bechtel Corp*. (1983) 33 Cal.3d 868, 875; see also *Ferguson v. Yaspan, supra*, 233 Cal.App.4th at p. 683 ["The existence of the fiduciary relationship limits the plaintiff's duty of inquiry by eliminating the plaintiff's usual duty to conduct due diligence, but it does not empower that plaintiff to ' "sit idly by" ' when ' " 'facts sufficient to arouse the suspicions of a reasonable [person][ ]' " ' ' "come to his [or her] attention" ' "].) After the close of evidence, the trial court explained "just to make the record clear, what my thinking has been—and now I have heard all of the evidence, it confirms my impression—that Andrew pretty much ran the corporation as his own wallet. I mean, to some extent, it looks like things were done without corporate formality . . . . [¶] . . . But anyone who was familiar with the corporation, it seems to me, would have been on notice that that was the practice. And that is why I felt Laches applied. . . .

And looking at B, you know, those, if it was payments for hay, they are all round figures. It was $15,000, $20,000, $100,000, $400,000, whatever they were. They are all just checks written from ARI to John, and I think that would be evidence of John's knowledge of Andrew's propensity to treat the corporation as his own personal business. Maybe they were loans, whatever they were, to John. So I felt those were important to show that John was aware of that general practice of Andrew during that period of time." The evidence also established that John was told millions of dollars were missing from the company as early as 1996. Accordingly, even with the existence of a fiduciary duty, substantial evidence supports the conclusion John had a duty to examine the documents that were available to him.

Further, John cannot use the trial court's failure to express this conclusion in its statement of decision to his benefit because (so far as we can determine from the record on appeal) he did not file any objection to the statement of decision on these grounds or otherwise. (See Cal. Rules of Court, rule 3.1590(g).) There is "a two-step process for avoiding implied factual findings. First, a party must request a statement of decision pursuant to Code of Civil Procedure section 632. [Citation.] Second, if the trial court issues a statement of decision, a party claiming omissions or ambiguities in the factual findings must bring the omissions or ambiguities to the trial court's attention." (*Fladeboe v. American Isuzu Motors Inc*. (2007) 150 Cal.App.4th 42, 59.) Here, John completed only the first step of the process. Under these circumstances, "under Code of Civil Procedure section 634, the appellate court will infer the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues." (*Id.* at pp. 59-60.) We do so here and conclude John has failed to demonstrate reversible error as to the trial court's ruling regarding the statute of limitations.

C. Alleged Excessive Compensation

John's complaint alleged that on May 27, 2006, Toinette, Valerie, and Patricia voted to pay themselves excessive director fees and salaries that were justified as a means to equalize rent he had not been paying. In his opening brief, John asserts this claim fell (at least somewhat) within the limitations period. But the statute of limitations was not the basis for the trial court's disposition of the excessive compensation arguments. Rather, the trial court rejected these arguments on the merits. John also alleged that in 2007, Toinette, Valerie, and Patricia voted themselves loans of $554,000 each, this time to equalize a $400,000 loan made to John years earlier. The trial court found that John "and his advisors were informed of the entire plan in meetings and discussions (where [John] said he did not intend to pay the corporation the $400,000.00 promissory note he had borrowed in 2002). [John]'s attorney . . . and accountant . . . participated in the discussions. Had [John] not agreed to the 'equalization' plan, he probably would have been evicted from the corporate property that his family had occupied, rent free, for years. [John] signed Exhibit 319 . . . expressly agreeing to the 'equalization' plan which was set out in detail in that document." As John correctly observes, that exhibit, which was signed on May 21, 2006, does not mention directors' fees or salaries. It only recommends loaning Toinette, Valerie, and Patricia $528,000 each to equalize John's earlier $400,000 loan. But the trial court also found that John's attorney and accountant participated in discussions regarding the directors' compensation. John asserts that the testimony was clear that these discussions were about equalizing loans, and not the fees and salaries. This statement seems to contradict John's assertion that he does not challenge any of the trial court's findings of fact or claim that any fact the trial court relied on in reaching judgment was not supported by substantial evidence. Moreover, we disagree with his characterization of the record. Additionally, a financial planner hired by ARI testified that he discussed with John in advance the plans to pay salaries and

directors' fees instead of evicting him, and John did not object.[3] The trial court's conclusion that the compensation was part of an agreement that allowed John to continue to avoid paying rent is therefore supported by substantial evidence, and John has failed to demonstrate the trial court erred in its disposition of his excessive compensation arguments.

D. Laches

As to John's equitable claims, the trial court concluded he was barred by the doctrine of laches from obtaining any equitable remedy because his claims date back ten years[4] before he filed his complaint and he did nothing during that time.

"[T]he affirmative defense of laches requires unreasonable delay in bringing suit 'plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.' [Citation.] Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.] Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) Here, the trial court found only unreasonable delay. As set forth above, whether there was also prejudice to defendants or acquiescence in the acts about which John complains were questions of fact for the trial court to determine. As respondents do not direct us to any evidence or argument

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[3] The financial planner seemed to believe the loans were approved in 2006 and the salaries were approved in 2007. Either way, he testified he discussed the plans with John in advance.

[4] John notes that not all of his claims date back 10 years. We are not necessarily convinced this point is meaningful, but we also need not address it at this time.

they made supporting any implied finding of prejudice or acquiescence, and in light of the multitude of transactions about which John complains, we do not deem it appropriate for us to search the record unassisted for evidence of prejudice or acquiescence as to all of them. Rather, we will remand for the trial court to exercise its discretion and articulate its findings in the first instance.

III. DISPOSITION

The judgment is reversed and the cause is remanded to the superior court for further proceedings consistent with the views stated herein. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

HOCH, J.